CORPORATION REGULATION BY STATE AND NATION

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The topic is "The State and the Nation as Units of Control," with especial reference to the regulation of corporations. Just as in the field of natural law smaller units combine to form an organism which is not a mere aggregate of the inferior units but a new entity, and through an ascending series, organisms of differentiated function unite in a complete individual existence, so in municipal and conventional law, that is, the law of constitutions and statutes, there is no inconsistency between the nation as a unit of control and a state as a unit of control—between the ultimate unit and the separate unitary members. The state correlates and regulates the activities of persons, natural and artificial, and the functions of the municipal sub-divisions within her borders. The manifest tendency of the present time is for the general government so to correlate the states and to exercise its powers just as far as may be done under the constitution to that end.

There have been antagonisms in the past between the lesser sovereign units besides the great antagonism of the Civil War, which merged all former antagonisms and welded the state units and the national unit into an indestructible and perfect union. It seems strange now to recall, for instance, the sanguinary conflicts in this state between Pennamite and Yankee, which almost amounted to war between Connecticut and Pennsylvania, and yet did not involve the nascent federal power. No one would dream that in any like case now the national sovereignty would not instantly interpose between the contending forces. What a space has been traversed since the days when, very doubtfully, the Supreme Court determined boundary disputes between states, refusing to pass to other controversies between them! For now the court determines without doubt and with plenary jurisdiction that, for example, the United States, by its legislative and executive branches, cannot interpose in a conflict between two states over the irrigation use of the water of an interstate stream, but that the

federal supreme judicial power can interpose, and then proceeds to compose that conflict; determines that the City of Chicago must not pollute interstate waters to the injury of states and cities below, and that the air of the State of Georgia must not be poisoned by fumes from smelters in Tennessee.

The fear of Fisher Ames that the country would prove to be too divergent for homogeneity and unity, and too vast for patriotism, has turned out in the fullness of time to be a groundless fear. Along with that spectre has disappeared the spectre of states' rights. In these days that question has lost its abnormal character and undue emphasis, and we view it in the main with a just sense of proportion and without the old fear and suspicion that the sovereign power and bond between the states will swallow them all up. Yet all the guarantees on this subject must be preserved, and no one can be so foolish as to think that the states and their functions can be regarded as mere municipal sub-divisions of the United States and its powers, for to preserve the separate sovereignties and their relations to the safety, health and happiness of the people, and to obey all of the commands and prohibitions of the constitution on this subject is the very essence of our government.

It must always be remembered that under the constitution there are some activities for which the nation alone is competent, and others for which the states alone are competent. This separation must be preserved, however effectively and uniformly compared with the states, the federal power not limited by state lines may work, and however desirable it may be to advance faster than we are doing in economic and social development, and however the separate states may lag in correlating and unifying state action in matters important for common and equal progress everywhere. I state the general dividing line by quoting two famous passages, one from John Marshall's great judgment in Gibbons *v.* Ogden, the other from the speech of James Wilson, afterwards Justice Wilson, before the Pennsylvania Constitutional Convention of 1787.

John Marshall says:

> The *genius and character of the whole government* seem to be that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally;* but not to those which are completely within a particular state, *which do not affect* other states, and with which it is *not* necessary to interfere for the purpose of executing *some of the general powers* of the government.

Wilson's statement is:

> Whatever object of government is confined in its operation and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government *extends in its operation or effects beyond the bounds of a particular state* should be considered as belonging to the Government of the United States.

I shall not go into the distinctions and decisions along that delicate line where the federal power over commerce and the state power over matters of internal police meet and sometimes conflict. I proceed to the reasons for my personal conviction that, at least as to corporations, and their relations and activities, the federal regulation should go as far as under the constitution and law it may.

The inquiry is of course restricted to interstate and foreign commerce, and that is one limitation on us, the problem being to indicate why as matter of general policy in doubtful and close cases the leaning should be to national rather than state control. We must also lay out of view interesting current legislation and proposals for legislation on employers' liability and for compensation in any event for accidents (which change the substantive law in important respects regarding negligence, assumption of risk and related questions), because, on the one hand, the federal legislation just enacted is confined to one class of common carriers engaged in interstate commerce, that is to say, the railroads, and because, on the other hand, the proposed compensation laws apply to individuals or firms as well as corporate employers. We must contemplate now the broad general lines and have no time for details.

These are the propositions, then, that in modern and present industrial organization the volume and movement of business are vast and complex, the transactions more and more are carried on by corporations and by combinations which are a necessary and valuable part of effective economic development when duly controlled; that business not only means production and manufacture, but sale, exchange and distribution, that the distributing function is the object of all production, and that the interstate proportion of distribution far outweighs the intra-state share. In former days, for example, Maine lumber and Massachusetts shoes were mostly used at home, but now without any doubt a very much larger proportion of many commodities produced is consumed outside the

state of production than within it. All such interstate movements are part of those matters which are not completely within a particular state, and which do "affect other states,"—referring to the language of Marshall,—and which are objects of government extending in their operation and effects beyond the bounds of a particular state and which therefore should be considered as belonging to the government of the United States,—referring to Wilson's statement.

It is of the greatest concern to all the people of all the states that commercial rules and regulations shall be equal and uniform everywhere. One of the strongest arguments for the union under the constitution was the intolerable burden of conflicting and unequal laws affecting the interchange of commodities, and although the constitutional right of exact and equal justice to all citizens of the United States in any state has been well defined and established, the process of assimilation and harmony among the states is not yet complete. All the people of all the states and their national government must see to it that whatever a sovereign state's policy and power may be as to matters wholly within her borders, the effect of that policy, whether of action or inaction, must not be permitted to pass beyond her borders and injuriously affect other states and their citizens.

"Commerce" is a term of very broad meaning. The Supreme Court has been careful not to limit it by any general exclusions, and no one can now say to what interstate relations and activities it may not legitimately extend in the evolution of judicial doctrine dealing with the evolution of economic and industrial forces. I know that production has been strictly distinguished from commerce in a leading case which, indeed, seemed to present strong reasons for connecting them, because there there was a monopoly completing its ownership of all the plants in the market in order to control and monopolize a production which was necessarily intended only for commerce and in the main for interstate commerce. But a shifting of the emphasis can even now be observed, because the effect of a very recent decision (in the Danbury Hatters' Case) is to show that the production of articles within a state under contracts to be shipped to other states is to be regarded as so necessarily destined for interstate commerce as to come within the federal jurisdiction. The distinction between that case and the Knight case to which I

have just referred is a faint and delicate one, and yet it is plain that the latter decision tends to draw production within a state, designed *ab initio* for commerce among the states, into the category of interstate commerce.

Notwithstanding many abuses of the state power to incorporate, I can see no pressing and conclusive reason why the state should not continue to charter these artificial persons, which, as a general rule, must have a *locus* within some state. They are chartered to do all kinds of business including interstate business, and in any case cannot escape the federal power in the latter field. But the way should open to them, when their only business is interstate, to obtain federal incorporation, if they so elect, subject to state jurisdiction over the principal *locus,* if that is within a state rather than in a territory under the exclusive jurisdiction of the United States, and over any property located within a state. If the business is partly interstate only, then the way should be open to securing a federal license to authorize and regulate and protect that portion of the business. The conclusions to be emphasized are that by whomsoever the interstate business is done, whether by a natural or artificial person, and in whatever way the authority to transact that business is conferred, whether with or without federal incorporation or license, the regulation of such business is a federal matter solely, and the question of the power to regulate is to be determined ultimately by the federal courts. That is the first conclusion, and the second conclusion, it seems to me, is that the true policy of the general government—meaning the policy proper for its three branches, executive, legislative and judicial—is to extend and maintain the federal control over corporate activities in interstate commerce as far as the broadest contents and construction of that term will permit, consistently with the constitution and with reason.